SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 565

RADIO CORPORATION OF AMERICA, NATIONAL BROADCASTING COMPANY, INC., RCA VICTOR DISTRIBUTING CORPORATION, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION AND COLUMBIA BROADCASTING SYSTEM, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

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Broadcasting System, Inc.

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STATUTES CITED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 50C1459

RADIO CORPORATION OF AMERICA, NATIONAL BROADCASTING COMPANY, INC., AND RCA VICTOR DISTRIBUTING CORPORATION, ET AL.,

vs.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, ET AL.

MOTION TO AFFIRM

Appellees, United States of America and Federal Communications Commission, and intervenor-appellee, Columbia Broadcasting System, Inc., pursuant to Paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States, move that the judgment of the District Court be affirmed, and that the temporary restraining order now in effect be dissolved.

Statement

This is a direct appeal from the final judgment, entered on December 22, 1950, of a specially constituted three-judge District Court convened pursuant to the provisions of Section 402(a) of the Communications Act of 1934, as amended,

47 U. S. C. Section 402(a).[1] The court below (LaBuy, J. dissenting) granted the motion of defendant-appellees and intervenor-appellee for summary judgment dismissing appellants' complaints [2] which sought to set aside an order of the Federal Communications Commission. The District Court, on its own motion, also continued in force until April 1, 1951, or until terminated by this Court, a temporary restraining order which the District Court had granted pre-

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[1] Section 402(a) incorporates the provisions of Title 28, United States Code (Title 28 U.S.C. Sections 1398, 2284 and 2321-2325), relating to the enforcing and setting aside of orders of the Interstate Commerce Commission. Public Law No. 901, 81st Congress, 2nd Session, approved December 29, 1950, and effective thirty days thereafter, changing the procedure for review of orders of the Federal Communications Commission reviewable under section 402(a) of the Communications Act, is by its terms not applicable to pending actions such as the instant case.

[2] The original complainants were RCA, which had proposed its own system, and two of RCA's wholly-owned subsidiaries, National Broadcasting Company, Inc. (engaged in broadcasting) and RCA Victor Distributing Corporation (engaged in distributing *inter alia*, RCA black-and-white television sets). CBS intervened as a party defendant, and the following parties were permitted to intervene as parties plaintiff: Local 1031 of the International Brotherhood of Electrical Workers (a labor organization whose members are employed by television set manufacturers); Pilot Radio Corporation (a television set manufacturer); Emerson Radio and Phonograph Corporation (a television set manufacturer); Sightmaster Corporation (a television set manufacturer); Radio Craftsmen, Inc. (a television set manufacturer); Wells-Gardner Company (a television set manufacturer); and Television Installation Service Association (a trade association of companies engaged in installation and servicing of television sets). None of the plaintiffs or plaintiff-intervenors, except RCA, had participated in the proceedings before the Commission.

Appellees, in the Court below, objected to the intervention of the plaintiff-intervenors, and moved to dismiss the complaint as to NBC and RCA Victor Distributing, on the ground that they had no such legal interest as entitled them to maintain this suit. It is submitted that this contention is correct, and thus in any event, the appeals of all parties other than RCA should be dismissed. *Cf. Tennessee Electric Power* v. *TVA*, 306 U. S. 118; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464; *Moffat Tunnel League* v. *U. S.*, 209 U. S. 113; *Alex. Sprunt & Son* v. *U. S.*, 281 U. S. 249; *Massachusetts* v. *Mellon*, 262 U. S. 447; *Associated Industries* v. *Ickes*, 134 F. 2d 694 (C.A. 2); *Ex-Cell-O* v. *City of Chicago*, 115 F. 2d 627 (C.A. 7). But since it is believed that the appeal is insubstantial on its merits, the question of standing need not be argued at this time.

viously. Appeal was allowed on January 25, 1951 and appeal papers served on January 30, 1951.

The Commission's order (15 F. R. 7013) dated October 10, 1950, and effective November 20, 1950, amended the Commission's Standards of Good Engineering Practice by establishing engineering standards for color television transmissions. The effect of the Commission's order was to permit regular non-experimental broadcasting of color television, since until standards are set for a particular broadcasting service—whether radio, black-and-white television, or color television—there can be no regular broadcasting of that service. This is because unless standards are thus first set by the Commission, each broadcaster would be free to transmit whatever type of signal he chose, regardless of its interfering effect on other broadcasters and regardless of the ability of receivers to receive the signal. Accordingly, the Commission has for each service first established transmission standards to avoid such interference and to assure that members of the public will receive a uniform satisfactory service.

The Commission's order adopting color television standards did not require any broadcaster to broadcast color television; its only effect was to provide that if the broadcaster chooses to broadcast color television, the signals transmitted must conform to the technical engineering standards adopted by the Commission.

The Commission proceedings culminating in the order adopting standards for color television broadcasting may be summarized as follows:

On July 11, 1949, the Commission issued, as part of a larger proceeding the other phases of which are not immediately relevant herein, a Notice of Further Proposed Rule Making (14 F. R. 4483). This notice invited proposals for a change in transmission standards looking toward the

inception of color television service and described the conditions upon which proposals would be considered.

Hearings were held before the Commission *en banc* commencing September 26, 1949, and ending May 26, 1950. Of ten parties participating in the hearing the Radio Corporation of America (hereinafter referred to as RCA), Columbia Broadcasting System, Inc. (hereinafter referred to as CBS), and Color Television, Inc. (hereinafter referred to as CTI) proposed their own color television systems. They proposed, respectively, a "dot sequential" system, a "field sequential" system, and a "line sequential" system. In all, 53 witnesses were heard, and 265 exhibits offered, and eight demonstrations of the proposed color systems were held on the record.

On September 1, 1950, the Commission issued its First Report (Exhibit B to Complaint) covering the color television issues.[3] In this Report the Commission made unanimous and detailed findings and conclusions concerning the characteristics and performance of the three color television systems which had been proposed to the Commission. The Commission found that color television was a fundamental improvement in television. It also found that the CTI line sequential system[4] and the RCA dot sequential system fell short of the minimum criteria enunciated by the Commission in its Report for a color system, while the CBS field sequential system met these criteria.

In its summary of its findings concerning the deficiencies of the RCA system the Commission stated (Second Report, Par. 3):

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[3] Copies of the Commission's Reports and Orders will be lodged with the Clerk of the Supreme Court.

[4] CTI has not attacked the Commission's order and is not a party to these proceedings. Further reference to the CTI system, accordingly, is omitted.

"a. The color fidelity of the RCA picture is not satisfactory.

b. The texture of the color picture is not satisfactory.

c. The receiving equipment utilized by the RCA system is exceedingly complex.

d. The equipment utilized at the station is exceedingly complex.

e. The RCA color system is much more susceptible to certain kinds of interference than the present monochrome system or the CBS system.

f. There is not adequate assurance in the record that RCA color pictures can be transmitted over the 2.7 megacycle coaxial cable facilities.

g. The RCA system has not met the requirements of successful field testing."

The Commission also found that the deficiencies in respect of RCA's color fidelity (First Report, par. 132), picture texture (*ibid*, par. 133), complexity of receiving and station equipment (*ibid*, pars. 134 and 135), and susceptibility to interference (*ibid*, par. 101, 136), appeared to be inherent in the RCA system itself, with little or no likelihood of correction within the confines of the system.

In its summary of its findings concerning the CBS system, the Commission stated (Second Report, par. 5):

". . . the CBS system produces a color picture that is most satisfactory from the point of view of texture, color fidelity and contrast . . . receivers and station equipment are simple to operate and . . . when produced on a mass marketing basis should be within the economic reach of the great mass of purchasing public. . . . even with present equipment the CBS system can produce color pictures of sufficient brightness without objectionable flicker to be adequate for home use and . . . the evidence concerning long persistence phosphors shows that there is a spe-

> cific method available for still further increasing brightness with no objectionable flicker. . . . . while the CBS system has less geometric resolution[5] than the present monochrome system the addition of color to the picture more than outweighs the loss in geometric resolution so far as apparent definition is concerned."

The Commission did not, at the time of the First Report, finally adopt the CBS system. For while the CBS system had already reached a state of development which enabled the Commission to find expressly that it was a satisfactory system suitable for adoption (First Report, Par. 149), the Commission pointed out that the record disclosed further possibilities for the development of the CBS system or apparatus, which the Commission desired to take time to explore if the public interest were not adversely affected by the postponement of a final decision. These matters were the possibility of the use of a direct view tri-color tube with the CBS system, the use of horizontal interlace, and the possible efficacy of long persistence phosphors in reducing flicker.

Because the CBS direct-view receivers which had been demonstrated utilized a disc, the picture-size was, as a practical matter, limited to 12½ inches (First Report, par. 111). While a "tri-color tube" had been developed by RCA and demonstrated by RCA with its system, and while it was agreed that this tube could be used in CBS receivers so as to free them from any picture-size limitation, the Commission had some doubts whether the tube had yet been successfully developed and hence there still was uncertainty whether the limitation on direct-view picture size

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[5] Geometric resolution is defined as "the number of lines which the system can provide"; it is one of the factors which enter into the "apparent definition", or ability to produce clarity and detail, of a picture (First Report, par. 88).

of CBS receivers remained. (First Report, pars. 111, 144-5.)

During the hearing, a development known as "horizontal interlace"—a method of transmission which provides increased detail in both standard black-and-white and CBS color pictures—had been demonstrated, but the technique had not yet been fully tested or proven. Had the technique been successfully tested and proven it would have involved additions to, or changes in, both existing black-and-white television standards and the proposed CBS color standards. (First Report, par. 147.)

Another development which had been demonstrated during the hearing but had not yet been fully proven was the use of "long-persistence phosphors"—a coating on the receiver tube which would permit increased brightness of the picture without flicker, or, alternatively, would permit a change in standards in respect of the "field rate", as well as higher definition, in both black-and-white and color pictures. (First Report, par. 147.)

In addition to these matters, the Commission also considered what course of action to take with respect to the possibility of new color systems and improvements in existing color systems which had been informally called to the Commission's attention. (First Report, par. 148.)

The Commission noted in its First Report, however, that despite the advantages of postponing adoption of standards for the CBS color system in order to await the outcome of further developments in respect of the foregoing four matters, there was an important counterbalancing disadvantage. The disadvantage arose from the fact that while, on the one hand, the RCA system is "compatible"—that is, its color signals could be received on existing black-and-white sets as black-and-white pictures without requiring any change in such sets,—the CBS system, on the other

hand, is "incompatible"—that is, its color signals produce no black-and-white picture on existing receivers unless such receivers are modified or "adapted" at a cost of $32–$50. (First Report, par. 105.)

Because of the feature of incompatibility of the only system which the Commission found to be satisfactory, delay in adopting standards for the system would, the Commission noted, aggravate the problem of incompatibility by increasing the number of black-and-white receivers in the hands of the public and hence currently incapable of receiving the color signals (First Report, pars. 146-148). As the Commission found (*ibid*, par. 148) the problem of postponement was grave since

> "eventually the mere passage of time overpowers the incompatible system by the sheer weight of receivers in the hands of the public."

Postponement of adoption of the CBS system, which had been found to be satisfactory therefore, would mean that if, after such postponement, the compatible color television systems should still prove unsatisfactory,—and they had been found to have inherent defects which made satisfactory development doubtful—adoption of the only known satisfactory system might be impracticable because of the greatly increased number of receivers in the hands of the public which would require adaptation. Delay thus might result in a serious obstacle to making color television available to the public at all.

Faced with these two "difficult courses of action" (First Report, par. 145), the Commission decided to delay final adoption of the satisfactory CBS system if a way could be found to prevent the aggravation of the problems arising out of incompatibility. The Commission suggested as a method for confining the compatibility problem the adoption of "bracket standards"—i.e., a change in present black-

and-white standards so as to encompass a greater range of "lines" and "fields". The Commission stated that if it proved feasible promptly to adopt such new black-and-white standards, and if receiver manufacturers would promptly build black-and-white receivers capable of receiving the new range of standards, then the Commission could, consistently with the public interest, postpone final decision for a specified time because the new black-and-white receivers would, without further change, be able to receive CBS color signals in black and white and hence would be compatible (First Report, par. 150). The Commission expressly stated, however, that if bracket standards could not be promptly adopted and the new receivers built, a further delay would not be warranted and the CBS field sequential system would be thereupon adopted.[6]

Accordingly, concurrently with the First Report, the Commission issued a Second Notice of Further Proposed Rule Making (Exhibit C to Complaint) proposing the adoption of bracket transmission standards, and inviting comment, including alternative suggestions, from all interested persons. Thirty-three comments were received. These comments in general opposed adoption of bracket standards and indicated that the television receiver manufacturers could not or would not manufacture receivers with bracket standards within the time proposed by the Commission. No alternative suggestions for dealing with the problem of compatibility were advanced in any of the comments. On October 4, 1950, RCA also filed a petition (Exhibit E to Complaint) requesting that the Commission

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[6] Commissioners Hyde and Jones disagreed with the majority in that these two Commissioners believed that standards for the CBS system should be adopted without delay. Commissioner Hennock dissented on the ground that the postponement of adoption of the CBS standards to permit further experimentation under certain conditions was too short and should be extended to June 30, 1951.

review, between December 5, 1950 and January 5, 1951, claimed improvements made in the performance of its system, and that the Commission view further experimental broadcasts of the three proposed color systems during the period to June 30, 1951, before reaching a final determination.

On October 10, 1950 the Commission issued a Second Report (Exhibit G to Complaint), which noted that bracket standards could not be promptly adopted and bracket standard receivers would not be promptly made. Accordingly, as it had announced in its First Report, it concluded that the CBS field sequential color television system should be adopted. The Commission stated (Second Report, Par. 8) that since it had proven that there was no way to keep the compatibility situation in *status quo*, "we would be derelict in our responsibility to the public if we postponed a decision any longer. With no way of preventing the growth of incompatibility, the longer we wait before arriving at a final decision the greater the number of receivers in the hands of the public that will have to be adapted or converted if at a later date the CBS color system is adopted." Further, by delay the Commission "would be in the position of inviting the risk that if, after postponing a decision, the compatible color systems should again fail to meet the minimum criteria for a color system, as they have failed in the past, the number of receivers in the hands of the public would have increased to such a point where, as a practical matter, it might not be practicable to adopt an incompatible color system, even though we now know that such system meets all of the criteria for a color system" (Second Report, par. 6).

The Commission in its Second Report adverted to the four factors which had prompted it to seek a means of postponement without increasing incompatibility. As to

picture size, the Commission concluded that the public might well prefer a 12½ inch direct view color picture to a larger size black-and-white picture, and that in any event, adoption of the CBS standards would furnish a "healthy incentive" to develop a means—either the tri-color tube or some other apparatus[7] of producing larger size direct-view pictures (par. 12). In respect of "horizontal interlace", the Commission stated (par. 13) that if the technique should be successfully developed in the future, it could be superimposed on the then existing standards without affecting any black-and-white or color receivers already in the hands of the public. Similarly, in respect of "long persistence phosphors", the Commission noted (par. 14) that such phosphors, if and when developed, could be utilized in receivers made after such development so as to increase the possibilities of brightness without flicker; this, however, was also a matter of improved equipment which would not affect the already satisfactory equipment sold in the meantime.

In respect of the possibility of new or improved compatible color systems, the Commission stated (par. 15) that there had been no showing since the close of the hearings that such developments had been carried beyond the stage of "paper presentation" so as to warrant reopening of the hearing. To reopen on such a basis, the Commission noted

> "would be inviting the risk that these new systems might fail as have all color systems in the past which we have been urged to adopt in the ground of compatibility and the increase in number of receivers in the hands of the public would make it exceedingly difficult to adopt an incompatible system—a system which we know is satisfactory."

[7] Development of receiver apparatus capable of producing direct view pictures larger than 12½ inches under the CBS system would not involve a change in the system or in the standards adopted by the Commission.

The Commission did, however, explicitly leave the door open for the future consideration of new and improved systems (pars. 16 and 17).

Simultaneously with its Second Report, the Commission issued orders, (1) denying the RCA petition of October 4, 1950, to postpone a final determination, and (2) amending the Commission's Standards of Good Engineering Practice to permit the regular non-experimental transmission of color television in accordance with the field sequential standards which had been proposed by CBS.[8]

Argument

The question of adoption of standards permitting a regular non-experimental color television service is indisputably one of importance. Black-and-white television is a new, rapidly expanding and important medium of mass communication. The addition of color is, as the Commission found (First Report, pars. 120, 121), an "important" and "fundamental" improvement in television broadcasting; it "opens up whole new fields for effective broadcasting."

Despite the importance of the issues before the Commission, and the large public interest there involved, however, this appeal presents no substantial or novel legal questions.

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[8] Commissioners Sterling and Hennock dissented from the Second Report and the order amending the Standards of Good Engineering Practice. Commissioner Sterling dissented on the ground that further time should have been permitted to explore the adoption of bracket standards, and that a conference should have been held with the manufacturing industry to agree on a "realistic timetable." Commissioner Sterling agreed that if this procedure should not result "in a practical solution" to contain the compatibility problem, "I would then join the majority in authorizing the field sequential system." Commissioner Hennock dissented on the ground that compatibility was so desirable a feature that final decision should be postponed until June 30, 1951, to provide further opportunity for developing such a system. She also agreed, however, that if steps could not be taken within 60 or 90 days to arrest the growth of incompatibility by the adoption of bracket standards or some other means, standards for the field sequential system should then be immediately adopted.

The basic issues presented for resolution by the Commission were whether any television color system was sufficiently and satisfactorily developed to warrant standardization and if so, which of the systems proposed should be adopted. Plainly, these issues called for the making of specialized technical, economic and social judgments by the Commission which are necessarily within its particular competence. The judgments were made on the basis not only of a mass of complex and technical testimony, but also on extensive theoretical analysis and first-hand observation.

While the issues thus before the Commission were indeed difficult and complicated, involving the making of highly technical rules which operate in *futuro*, it is precisely for these reasons that its decision, once made and passed from the administrative to the judicial process, presents the classic case for judicial non-intervention. Without important exception, the contentions of appellants seek to raise questions only of the correctness of the Commission's decision in adopting standards for the CBS color system and refusing to adopt standards for the RCA color system, and of the wisdom of the Commission in resolving the various questions which were within its special area of discretion. It is elementary that in such circumstances, the Court will not substitute its judgment for that of an administrative agency. *National Broadcasting Company* v. *United States*, 319 U. S. 190; *Federal Security Administrator* v. *Quaker Oats*, 318 U. S. 218; *American Telephone & Telegraph Co.* v. *United States*, 299 U. S. 232.

1. *Substantial Evidence.* After extensive hearings evidence, demonstrations and technical analysis, the Commission made comprehensive findings and conclusions that on the one hand, the RCA system was not satisfactory and that many of its defects were inherent, and that, on the other hand, the CBS system met all the criteria for a

satisfactory color system. Plainly these findings find substantial support in the record.

Indeed, while appellants urged in the Court below, and urge here, that there was no substantial supporting evidence, they have failed to specify any of the multitude of findings alleged to be without such support. As stated by the Court below, "While the findings of the Commission are severely criticized, it is not contended in the main that they are not supported by substantial evidence." Even in respect of the few findings which appellants did attack in the Court below, they did no more than cite evidence which might have supported different findings. Plainly, this is not enough and raises no question worthy of consideration by this Court.

Nor do appellants' broader attacks on this score raise any serious issues. Even if, as appellants contend, the Commission rejected the testimony of "independent" industry experts and accepted only the testimony of CBS, CTI and FCC witnesses as the basis for its findings—something the Commission did not do[9]—no error would be

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[9] For examples of criticism of the RCA system by so-called "industry experts," see Tr. 4865, 5219, 5452, 5455, 5664, 5666-7, (lack of color fidelity), Tr. 5222 (inadequacy of brightness); Tr. 9458 (inferiority of overall definition); Tr. 5214, 9302, 9550 (picture texture); Tr. 5359, 5452, 9937 (small area flicker); Tr. 5217, 9377 (registration problems); Tr. 7450-1, 7962-3, 8093, 8202-3, 8245-6, 8249, 8270, 9380, 9687, 9956 (unreadiness and need for field testing); Tr. 7970, 8100, 8244, 10004-5 (camera complexity); Tr. 8192, 8202-3, 8205, 8390, 9687 (mixed highs principle); Tr. 8224-5, 8263-4 (susceptibility to interference).

While it is true that most of the "industry experts" opposed adoption of CBS standards, they did not advocate the adoption of the RCA system. On the contrary, they urged that no color standards be set and that the Commission wait for the development in the future of a satisfactory compatible system. In commenting on such testimony of these experts, the Commission stated (First Report, par. 139): "Moreover, the testimony of many of the parties was not based on field testing conducted by them or upon an analysis of field testing made by others but was merely recommendations and expert opinions. We cannot overlook the fact that many of these same parties offered recommendations and expert opinions of

involved. It is settled that it is not error even if an agency does reject all the testimony of one side, and accept that of the other side. *NLRB* v. *Pittsburgh SS Co.*, 337 U. S. 656; see also *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 341.

Appellants are similarly in error in their contention that the findings adverse to the RCA system were based on evidence taken in earlier portions of the hearing and hence had been superseded by later developments. The Commission plainly had not only the right, but the duty, of making its determination on the whole record, and of deciding which evidence adduced in early stages remained applicable at the close of the hearings. The Commission's findings show on their face that they took into account developments and improvements in the RCA system made in the course of the hearing (e. g. par. 53, relating to receiver equipment and the development of the tri-color tube; par. 83, claimed correction of misregistration; par. 87, color fidelity). And there is, in any event, ample evidence in the record, adduced after the date of the claimed improvements, to warrant the Commission's findings.[10]

Further, appellant's contention that the Commission's determination was based "in important respects on 'speculation and hope' " is squarely refuted by the Commission's decision itself. In its First Report (Par. 146), the Commission expressed uncertainty concerning whether the di-

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the same kind as a basis of their advocacy in the 1946-7 hearing of the [RCA] simultaneous system—a system which never survived field testing."

[10] Examples of testimony adduced in 1950 (which appellant in the Court below designated as the cut-off date prior to which evidence concerning RCA was obsolete) and critical of the RCA system appears in the preceding footnote on page references after Tr. 6000. Other examples include Tr. 6254, 8460, 8610, 8880-2, 9268, 11205-7, 11242-6, 11334, 11470-1, 11491 (all relating to RCA's lack of color fidelity); Tr. 8460, 9279-80, 11257-8 (inadequacy of brightness); Tr. 9269, 11384, 11470-1, 11491 (system complexity); Tr. 6606, 8489, 11217 (picture texture); Tr. 8460, 11201, 11479 (misregistration).

rect-view receiver of CBS could be freed from existing picture size limitations, either by the use of the RCA tricolor tube or by some other means. This was one of the four factors which led the Commission, in its First Report, to postpone adoption of the CBS System; it stated that if some means could be devised to avoid aggravation of the incompatibility problem resulting from delay (*supra*, pp. 8-9), further development might establish whether or not the limitation on picture size remained and hence the Commission's ultimate decision would not be based on "speculation and hope" *on that question* alone. In its Second Report (par. 12), the Commission explicitly stated that its decision rested on the evidence that "CBS can produce satisfactory color pictures in projection receivers and on direct-view tubes of at least 12½ inches in size."

Clearly, therefore, the Commission's decision was not based on "speculation and hope" that larger size pictures might be developed; rather it was squarely based on the fact that the demonstrated size of 12½ inches was satisfactory and this size was not such as should bar the adoption of standards for the CBS System.

2. *The Reasonableness of the Commission's Decision.* Appellants also contend that the Commission's action in adopting standards for the CBS System and refusing to adopt RCA standards was arbitrary, capricious and contrary to the public interest. They center their attack on the grounds that the CBS System should not have been adopted because it is incompatible,[11] while the RCA system,

[11] Appellants have also contended that the Commission was arbitrary and capricious in not rejecting the CBS system because of alleged deficiencies in direct-view picture size and allegedly inadequate resolution. But the Commission's decision plainly shows that these factors were fully considered and that the Commission's refusal to insist on current unlimited picture-size and greater resolution was entirely rational. In these circumstances its judgment is decisive in this court.

it is urged, should have been adopted because it is compatible.

The Commission's decision readily establishes (First Report, pars. 123 and 124) that it carefully considered the question whether to insist on compatibility as a condition precedent to adopting a color system. Briefly summarized, the Commission found that while compatibility was desirable, it was less important than a satisfactory color system.

It found that compatible systems thus far proposed had gained compatibility only at the fatal expense of complexity or poor color quality, or both. It concluded that, based on a study of the history of ten years of development of color television

> "from a technical point of view, compatibility, as represented by all color television systems which have been demonstrated to date, is too high a price to put on color." [12]

And the Commission further noted that the problem of compatibility was transitional, and would progressively decrease in importance as new receivers capable of receiving CBS color signals came on the market and replaced existing sets.

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[12] Appellants mistakenly urge that the Commission's adoption of color standards which are incompatible with black-and-white standards constitutes a departure from principles enunciated by the Commission on May 28, 1940. In its Report of May 28, 1940, the Commission was dealing solely with black-and-white standards. In 1941, when the Commission first dealt with the question of color, it explicitly recognized and proposed different (and incompatible) standards for color than for black and white (First Report, Pars. 8 and 9). And again in 1947, when the Commission again considered color television, it stated that it was of the opinion that "compatibility is an element to be considered, but that of greater importance, if a choice must be made, is the development of the best possible system, employing the narrowest possible band width, and which makes possible receivers capable of good performance at a reasonable price." (First Report, par. 19.)

It is important to note that the issue of compatibility involving the effect on existing black and white sets, cannot properly be considered in isolation from the question of "convertibility"—i.e. the ability to "convert" existing sets so that they will produce *color* (as distinguished from black and white) pictures from color signals. As the Commission found, conversion of existing sets is possible under the CBS system at a reasonable cost (First Report, par. 106; see also Second Report, par. 10). Under the RCA system "no practical converter was demonstrated" and hence it "failed to meet the test of convertibility" (First Report, par. 103; Second Report, par. 10). In these circumstances, appellant's emphasis on the cost, alleged to amount to $1,500,000,000, of adapting and converting existing receivers to receive CBS color signals in color is misconceived since so far as the record shows, existing sets can never receive RCA color signals in color irrespective of cost.

In these circumstances, and particularly since the Commission found that the two compatible systems were inherently deficient, while the incompatible system met the criteria for a satisfactory system, plainly the Commission's refusal to insist on compatibility was a wholly rational judgment. Again, this was a judgment within its particular province. It cannot, therefore, be overturned.

Conversely, it is obvious that the Commission was not arbitrary or capricious, or otherwise legally in error, in refusing to adopt RCA standards, either alone or in conjunction with CBS standards, solely on the ground that the RCA system is compatible.

The fact that a system's signals can be received in black-and-white on existing receivers, does not make it unreasonable for the Commission to reject that system, where it is found to be inherently deficient and incapable of producing satisfactory color pictures. It was, on the contrary,

more reasonable for the Commission to conclude that to permit the regular commercial broadcasting of an unsatisfactory system, and thus to encourage the public to purchase RCA color receivers which cannot produce satisfactory color pictures would palpably not be in the public interest.

On this ground alone, the Commission was justified in not adopting standards for the RCA system, whether alone or as supplementary to CBS standards. But further, the Commission was not arbitrary or capricious in refusing to adopt "multiple standards"—i.e., two or more sets of standards for each of the several systems. In the entire history of broadcasting there always has been a single set of standards for regular non-experimental operation of the particular service involved. Inherent in the scheme of broadcasting is the concept that "competition" among several technical methods of transmitting the same broadcast service is precluded by the necessities of regulation in a field where diversities of systems may lead to the chaos which regulation is designed to prevent. There are compelling reasons for this: Multiple standards would be complex and confusing, and would result in the purchase either of unduly complicated and as yet undeveloped receivers, or of receivers which could receive only some of the color broadcasts and not others.[13]

In these circumstances, the Commission's refusal to adopt multiple standards was clearly within the area of its discretion and, therefore, appellants' contentions on this score raise no substantial issue.

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[13] Indeed, one of the major areas of agreement among the witnesses before the Commission related to "multiple standards": almost without exception, they agreed that it would be undesirable to set standards for more than one color system.

Baker, Tr. 9685-6; DuMont, Tr. 5729, 9412, 9416; Smith, Tr. 8173-5; Lippincott, Tr. 4701; Matthews, Tr. 11341; Stanton, Tr. 7116-34, 7216-20.

3. *The RCA "Progress Report" and the Condon Committee Report.* Appellants' contention that the Commission was in error in its treatment of the RCA "Progress Report" dated July 31, 1950 (Annex D of Exhibit D to the Complaint), and of the Condon Committee Report (Report of the Advisory Committee on Color Television to the Senate Committee on Interstate and Foreign Commerce) (Annex C of Exhibit D to the Complaint) raises no substantial question.

On July 31, 1950, two months after the hearing had been completed, RCA issued to the industry and transmitted to the Commission an informal "Progress Report." This report did no more than claim certain improvements in RCA equipment and technique. It embodied no unequivocal claims or descriptions of alleged improvements or developments with respect to color fidelity, misregistration, especially at the camera, criticalness of color control, or excessive susceptibility to interference, which the Commission had found among others, to be insuperable obstacles to the adoption of the RCA system. Indeed, at the time that RCA transmitted the report to the Commission, it did not request that the record be reopened or that the report be made a part of the record.[14]

The Progress Report was again submitted to the Commission by RCA on September 28, 1950, as an appendix to RCA's comments purportedly addressed to the question of the adoption of bracket standards. (See *supra*, pp. 9-10.) While the Second Notice of Further Proposed Rule Making which the Commission issued concurrently with its First

[14] In fact, three days later RCA implicitly repudiated any suggestion that the Commission's decision should be delayed to reopen the record for consideration of matters included in the Progress Report. On August 2, 1950 the Chairman of the Board of Directors of RCA wrote to the Chairman of the Commission, expressing opposition to delay and requesting prompt determination and the setting of standards. (Affidavit of Stanton filed in the court below.)

Report invited comments only on the question of bracket standards (Exhibit C to the Complaint), RCA seized on the opportunity thus presented to go far beyond the question of bracket standards and to attempt to reargue the merits of the Commission's First Report and the several color systems. In so doing RCA embodied not only the Progress Report but also a report of the Condon Committee Report which had been submitted to the Senate Committee in July 1950.

At the outset, it is clear that consideration by the Commission of either the Condon Report or the RCA Progress Reports as evidence upon the basis of which the findings and conclusions might have been modified would have been improper. The Commission had already held a full formal hearing on the record in which all parties had complete opportunity to adduce evidence and subject the claims and testimony of other parties to cross-examination and practical demonstration on the record. Were the reports to be given consideration as a basis for modified findings and conclusions, conformity with the prior course of the proceedings and fairness to the parties would have required that the record be reopened for the introduction of these reports as evidence subject to cross-examination by the other parties.

The most, then, that the Commission could have done with respect to these reports is to consider whether they afforded a basis for reopening the hearings. And, it is significant, in this connection, that RCA never requested that the record be reopened for this purpose. This may well have been because neither report contained anything which would have warranted such action—action, it must be remembered, which would have been in the nature of a grant of rehearing never sought by any of the interested parties.

(a) *The Condon Report:*—This report was prepared by a group of individuals at the request of the Chairman of the Senate Committee on Interstate and Foreign Commerce. It was, of course, a report only to the Senate Committee and it reached no determinative conclusions with respect to the several color systems. Such evaluations as were made of the systems were, as the Condon report itself states, based on written and oral evidence submitted in the Commission hearings, and the demonstrations which were part of those hearings (see paragraphs 15, 20, 25 of Condon Report). Thus the report referred to no new evidence relating to the systems before the Commission, and such conclusions as were embodied in it could not be considered as a basis for reconsideration. For, as the court below put it, "After all, Congress has conferred upon the Commission and charged it with the responsibility of conducting hearings and in reaching its own independent conclusions predicated thereon."

(b) *The R.C.A. Progess Report:*—This Report, as has been noted, was submitted twice to the Commission. It was no more than a collection of claims of improvements which do not go to the basic defects of the RCA system as found by the Commission. As the Commission stated in its Second Report (par. 15) with respect to "improvements in existing color systems which have been informally called to our attention since the hearings closed",

> a new television system is not entitled to a hearing or a reopening of a hearing simply on the basis of a paper presentation. In the radio field many theoretical systems exist and can be described on paper but it is a long step from this process to successful operation. There can be no assurance that a system is going to work until the apparatus has been built and has been tested. *None of the new systems or improvements in systems meet these tests so as to warrant reopening of the hearing.* [Emphasis supplied.]

The short and comprehensive answer to the appellants' present contention that the Commission erred in its treatment of each of the reports appears in paragraph 9 of the Commission's Second Report, it being remembered that the reports were submitted with the comments invited by the Commission's Final Report:

> . . . we have carefully considered all the material set forth in the comments, filed pursuant to our notice concerning bracket standards, as they are directed to the findings and conclusions in the Commission's First Report relating to the three color systems. Most of this material is merely a restatement of the parties' contentions made over and over again during the course of the hearing. These contentions have been analyzed in detail in the Report and no further discussion of them is necessary here.

The fact is that these reports were, with the exception of allegations of untested improvements, nothing more, in essence, than restatements of what had been once fully canvassed. Refusal to reopen the hearings on the basis of the tender of the reports, particularly in the light of the Commission's explicit statement that properly tested improvements would be considered at any time (see *supra*, p. 12), was hardly arbitrary.[15]

4. *Refusal to Postpone Final Decision.* On October 4, 1950, over a month after the Commission's Report reject-

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[15] Appellant's reliance on Section 4 of the Administrative Procedure Act is misplaced. Section 4 relates to an agency's consideration of written materials presented in rule-making proceedings where no formal testimonial hearing is held. Where, as in the instant case, an administrative agency holds such a formal hearing, it is clearly inappropriate for the agency to consider the sworn testimony adduced at the hearing in hotchpot with *ex parte* material submitted by one of the parties after the close of the hearings. The Administrative Procedure Act, of course, requires no such nullification of formal hearing procedures and the protection they are designed to afford the interested parties.

ing the RCA system, RCA filed a petition (Complaint, Exhibit E) requesting the Commission:

> "(a) During the period December 5, 1950 to January 5, 1951, to review improvements made in the performance of the RCA system; and
>
> (b) During the period to June 30, 1951, to review experimental broadcasts of color signals under the RCA, CBS, and CTI and other systems, before making a final determination in respect to color standards."

The petition contained no facts indicating the actual accomplishment of improvements.

There was clearly no abuse of discretion in not acquiescing in this request to keep the proceedings open at that time in view of the full opportunity given RCA to present its proposals, the already prolonged nature of the proceedings, including the hearing of testimony by 53 witnesses, the holding of eight record demonstrations, the filing of proposed findings and conclusions, and the detailed findings with respect to the defects in the RCA system contained in the First Report. Since the October 4, 1950 petition made no showing with respect to RCA's ability to remedy these basic defects, the Commission clearly did not abuse its discretion in refusing further to postpone final decision at that time. The petition was addressed solely to the Commission's discretion, and only a showing of the clearest abuse of that discretion would warrant a finding of error. *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515; *Interstate Commerce Commission* v. *City of Jersey City*, 322 U. S. 503.

Clearly, no such showing was made here. The Commission had given full consideration to the question of delaying a final decision in its First and Second Reports (First Report; Second Report, par. 6-15, par. 144-151, see *supra*, pp. 7-10). Most significantly, as we have seen, the Commis-

sion noted that since the CBS system was incompatible, every day of delay meant the continued aggravation of the compatibility problem by the sale of receivers which would require external adaptation. This problem was, and still is, one of constantly growing proportions. If, after a delay in a final decision, the compatible systems still proved to be unsatisfactory, and they gave little promise of satisfactory development because of inherent defects, the adoption of the field sequential system might prove to be impractical because of the greatly increased number of receivers in the hands of the public which would require adaptation.

Thus, upon the most comprehensive consideration and after a postponement from September 1 to October 10, 1950, to explore means for arresting the problem of compatibility if a final decision were to be postponed, the Commission concluded that a final decision should no longer be delayed.

The action of the Commission attacked, and sustained, in the District Court was thus a carefully reasoned policy decision based upon consideration of all relevant factors. It was an admittedly difficult decision, but one of exactly that nature which is within the informed competence of an administrative agency. It was a decision made with the sole aim of making available to the people of the United States at the earliest practical time a satisfactory system of color television. It was taken in recognition of the obvious fact that, particularly in a field such as television where technical improvements, even in black-and-white, constantly occur, there must be a stopping point somewhere if standards are ever to be set. Appellants can, therefore, not possibly show that this is so arbitrary "as to be the expression of a whim rather than an exercise of judgment," the showing appellants must make to secure a reversal of the District Court's judgment (*American Telephone &*

Telegraph Co. v. *United States*, 299 U. S. 232, at 236-7). Thus appellant has palpably failed to raise a substantial question on this score.

5. *The Participation of Edward Chapin in the Proceeding Before the Commission.* Appellants challenge the participation in the proceedings before the Commission of Edward W. Chapin, a Commission engineer, on the ground that he had invented an automatic switch usable with a non-compatible system. Mr. Chapin clearly had no financial interest in the matter since he and his co-inventor, William K. Roberts, executed an assignment to the Government of the United States in accordance with established Commission and Government-wide policy for the transfer of all such rights to the Government. The facts concerning the invention were completely disclosed on the record (R. 5980-5987), and while RCA objected to evidence concerning the invention, it made no objection at any tme to the continued participation of Mr. Chapin in the proceedings (R. 5980-5983). The allegations concerning Mr. Chapin disclose no substantial claim of bias by the Commission or any other legal er or.

Prayer for Affirmance

For the foregoing reasons, it is evident that no substantial question of fact or law is raised by this appeal. It is, therefore, respectfully submitted that the Final Judgment of the District Court should be affirmed and the temporory restraining order issued by that Court be dissolved.

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